Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

William A. Weckel,

Petitioner,

v.

Denise R. DeMonte

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did the Maryland trial and Appellate Courts err in depriving and reducing the Petitioner of his legal and physical custody rights to his son without having a compelling state interest; and if not, did the Maryland courts err in failing to use the least restrictive means possible?

Did the Petitioner receive a fair trial; and did the Trial Judge commit a harmful and prejudicial error by failing to automatically recuse herself and declare a mistrial; and did the Appellate Courts fail in recognizing that?

Was Maryland's general statutory scheme, as applied by the Trial Court and the Appellate courts constitutionally compliant?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

William A. Weckel respectfully petitions this Honorable Court for a writ of certiorari directed to Maryland's Court of Appeals for the purpose of reviewing the decisions of the Maryland appellate courts and trial court that destroyed Petitioner's valid rights without due process of law and violated his equal protection guarantees; and to invalidate Maryland's statutory scheme that infringes the Constitutional equal protection and parental rights of fit Maryland parents.

OPINIONS AND ORDERS BELOW

The case in the trial court was designated DeMonte v. Weckel, Case Number 03-C-02-013320, Circuit Court for Baltimore County. The judgments sought to be reviewed were entered on June 23, 2004 (is set forth in the Appendix (App.) at 30a - 34a) and the amended order dated 22 July 2004 (App. 26a-29a). The case in the appellate court, Maryland's Court of Special Appeals, was designated Weckel v. DeMonte, Case No. 01117, September Term, 2004. The judgments sought to be reviewed were entered on September 30, 2005 (App. 2a - 25a), and the mandate of the Court of Special Appeals was issued on 17 October 2005. The order denying the Petition for Review by Maryland's Supreme Court, the Court of Appeals is set forth at App. 1a.

BASIS FOR JURISDICTION

Maryland's Court of Appeals denied the Petition for Review on 12/21/05. This made the judgment of Maryland's Court of Special Appeals the final judgment of the Maryland

courts. Certiorari is proper in accordance with 28 U.S.C. §1257 as a petition to review the final judgment or decree of the highest court in the State for violation of Petitioner's U.S. Constitutional rights, and because a State statutory scheme is a violation of rights guaranteed and protected by the U.S. Constitution.

Statement of the Case

This matter was tried over three days (5/17/04, 5/18/04, 6/7/04) in the Circuit Court for Baltimore County regarding the issues of custody, visitation, and child support for the minor child of the parties, James Edward DeMonte Weckel (DOB: 8/28/02). At the conclusion of the trial, the Circuit Court, Honorable Vicki Ballou-Watts presiding, declared both parents fit, awarded sole legal and primary physical custody of the minor child of the parties to the Respondent, Denise DeMonte. The Court awarded the Petitioner, William Alan Weckel, a visitation schedule based on what the Court deemed to be in the best interests of the minor child and established Petitioner's child support obligation to the Respondent using the sole guidelines formula for calendar year 2003, and backdated the award to January 1, 2003. The Court also applied the sole guidelines child support calculation for the year 2004 beginning January 1, 2004, through the conclusion of the trial on June 7, 2004, and continuing thereafter.

After the conclusion of the trial, Petitioner, realizing that the Respondent's calendar was in error for the year 2003, and the fact that the court's award of visitation post trial and for the remainder of calendar year 2004, 2005, and so on gave the Petitioner 35% of the annual overnights prospectively, filed a Motion to Alter and / or Amend the Order of the Court to correct the sole calculation of child support to the shared child support obligation and reduction of his accumulated child support arrearages, and correction of

his prospecti[illegible]hild support obligation according to the shared guidel[illegible] child support obligation. Petitioner also requested that the court reconsider the sole custody award to the Respondent. The Respondent also filed a Motion for Clarification asking that the Court revise the visitation schedule to reduce the Petitioner's overnights to under 35% of the overnights per year so that the Respondent could maximize received child support, arguing that the Court could not have meant to award sole legal and primary custody to the Respondent and still grant to the Petitioner a visitation schedule which would require the use of the shared child support guidelines (over 35% of the overnights). The Petitioner, unsure of his basic monthly child support obligation during the pendency of the Court's ruling on the, then pending, Motion for Clarification and Motion to Alter and / or Amend, which was argued before the trial court on July 16, 2004, did not pay child support to the Respondent for July prior to the July 16, 2004 hearing. Additionally, the Trial Court had ordered in its June 9, 2004 ruling that Counsel for the Respondent prepare a wage attachment Order in which the Petitioner was not aware had not been done prior to the July 16, 2004 hearing. The court took umbrage to the fact that the Respondent had not received child support for the month of July prior to July 16, and modified the visitation schedule to reduce the Petitioner's overnight visits to less than 35% of the annual overnights, and made a passing reference in its Ruling to the schedule for visitation being disruptive to the child and that a further reduction of the Petitioner's overnights as being in the best interest of the child. An Appeal from the Court's June 23, 2004 Order was filed, and an Amended Appeal to the Court's Amended Order of July 22, 2004 , was filed after the entry of the Amended Order. The Court of Special Appeals affirmed the Trial Court's decision in its Opinion dated September 30, 2005. Maryland's highest court, The Court of Appeals, denied the Petition for Review on December 21, 2005.

REASONS FOR GRANTING THE WRIT

Did the Maryland trial and Appellate Courts err in depriving and reducing the Petitioner of his legal and physical custody rights to his son without having a compelling state interest; and if not, did the Maryland courts err in failing to use the least restrictive means possible?

Petitioner bases the Trial Court's lack of jurisdiction on the premise that there was no finding of parental unfitness, a constitutional requirement when a fundamental liberty right is infringed upon. In fact, the trial court found that the Petitioner was and is a fit parent (see App. 30a-34a). There was never any allegation throughout the trial sufficient enough to justify the fit father-Petitioner to subject his parental judgment to unwanted and unconstitutional litigation. To survive strict scrutiny, the state must first prove its compelling interest.

The biological parent's fundamental right to custody of their minor child is an implied substantive liberty right recognized under the Fourteenth Amendment to the U.S. Constitution.[1] The equal protection clause of the Fourteenth Amendment provides that strict constitutional review is warranted whenever governmental action seriously burdens fundamental rights.[2] This amendment also recognizes that persons (parents) similarly situated must be treated similarly. Additionally, the United States Supreme Court has held that the fundamental right to privacy protects citizens against governmental intrusion in such intimate family matters as

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[1] "Perhaps one of the oldest of the fundamental liberty interests recognized by [the] Court", Troxel v. Granville

[2] The "Fundamental Interests" strand of Equal Protection Strict scrutiny. The requirement of a compelling state interest to intervene upon implication of a fundamental federal right to include a parent's liberty interest in the care, custody, and companionship of their minor child.

procreation, child-rearing, marriage, and contraceptive choice.[3] Rulings which impinge on fundamental rights are presumptively unconstitutional.

> It is well settled that, quite apart from the guarantee of equal protection, if a ruling "impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional." Harris v. McRae 448 U.S. 297, 312 (1980)

The petitioner has been deprived of fundamental rights[4], and as a consequence, the State must have both a compelling interest in the deprivation of the right and the State must narrowly tailor the infringement to serve the State's interest. *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982); *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). Without both of these constitutional requirements, the state lacks subject matter jurisdiction.

To survive strict scrutiny, the state must first prove its compelling interest. The State of Maryland, nor its court system, has any compelling interest. The fact that the Petitioner is not married to the Respondent is not a compelling interest. Again, the equal protection clause of the Fourteenth Amendment recognizes that persons (parents) similarly situated must be treated similarly. The State of Maryland has no business discriminating between when to use the "Best Interest of the Child" standard based solely ~~on~~ the marital status of a child's parents. Just because a child's

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[3] Planned Parenthood of Southeastern Pennsylvania v. Casey 505 U.S. 833, 926-927 (1992)

[4] The fundamental liberty right is to do as you wish with your child, and the fundamental privacy right is for no one to inquire into what you are doing. Privacy rights can only be overcome with an allegation the child is in substantial harm, and Liberty rights can only be overcome by proving that harm is present.

parents do not marry, and one parent chooses to file a custody complaint is not a compelling reason for State intervention. When no substantial harm threatens a child's welfare, the state lacks jurisdiction for the infringement on the fundamental right of the petitioner to raise his child as he sees fit.

The "Best Interest of the Child" standard is automatically secondary to a parent's rights. Best interest can only be asserted after the state or trial court has shown a compelling state interest that has survived strict constitutional scrutiny. In other words, "best interest" is only properly used after parental rights have been constitutionally terminated. In the petitioner's hearing, the trial court determined that the child, James, has always been cared for by both the Petitioner and the Respondent, that James has never been in "substantial harm," and that the Petitioner is a fit parent. Since there is no compelling state reason to infringe upon the Petitioner's fundamental liberty rights, the trial court lacked jurisdiction.

The Washington Supreme Court has all but invalidated the "Best Interest of the Child" standard in that state:

> Short of preventing harm to the child, the standard of "best interests of the child" is insufficient to serve as a compelling state interest overruling a parent's fundamental rights.... To suggest otherwise would be the logical equivalent to asserting that the state has the authority to break up stable families and redistribute its infant population to provide each child with the "best family." It is not within the province of the state to make significant decisions concerning the custody

of children merely because it could make a "better" decision.[5]

In the event that it is determined that the Trial Court did have jurisdiction, the Trial Court is required to use the least restrictive means available to serve Maryland's compelling interest. The "best interest" standard does not supercede narrowly tailoring the State's infringement of a parent's fundamental child-rearing right. Again, the Petitioner and Respondent are both similarly situated people (parents). Testimony from the Trial Court showed that the child, James, was and is thriving in all his environments. Further, both the Petitioner, and Respondent have testified that whatever the Trial Court entered would be abided. Both parents have attended all the child's doctor's appointments and have been actively involved with James since his birth. The Trial Court determined both parents were fit, both parents had provided a good home to James, and that both parents love their child. Therefore, this is the ideal custody case in which the least restrictive means is either dividing parenting time 50 / 50, or having alternating periods of primary custody between both parents (such as Father has sole legal and physical custody on even years, and Mother has sole legal and physical custody on odd years). Although this alternative might mean the Trial Court needs to spend a little more time to come up with a parenting plan, this parenting plan would be the least restrictive means on both parents, would allow both parents to maintain their child-rearing fundamental liberty right (without enlarging or depriving the other parent of their child-rearing fundamental liberty right).

Additionally, in this case not only did the Trial Judge not use the least restrictive means, but she failed to also use a less restrictive means. At the conclusion of the 3 day trial,

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[5] In re Custody of Smith, 969 P.2d at 30-31.

the Trial Judge came up with a schedule she had considered to be in the best interests of the child. This schedule even gave the Petitioner over 128 overnights each year. Since the Trial Judge failed to use the proper guidelines for determining child support, a Motion for Reconsideration was filed to correct the sole calculation of child support to the shared child support obligation. Rather than to correct the child support, the Trial Judge decided to take time away from the Petitioner since it was the Trial Court's intent to have the Petitioner pay the highest possible amount of child support. This could have been accomplished with less restrictive means. As a result of the motion for reconsideration, the Trial Judge took away the following visitation time from the petitioner:

> Every other Tuesday evening visit from 3:00 PM – 7:00 PM.
>
> Every other Wednesday overnight from 3:00 PM until the next morning.
>
> Two additional weekends (by giving the Respondent vacation time).

Just several weeks earlier, this same Trial Judge had found it was in the best interests of the child to spend this time with the Petitioner. Since it was the Trial Judges intent for the Petitioner to pay maximum child support she could have simply deviated from the guidelines. Additionally, she could have accomplished this goal by simply giving the Respondent approximately 4 more overnights a year. When the Trial Judge took away the non-overnight, evening visits (which do not affect the child support calculations whatsoever) she was doing the opposite of what she had previously determined to be in the best interests of the child. Additionally, the same goes for the Wednesday overnight visits and the two weeks of vacation time given to the Respondent (the Respondent already had approximately 22 one-week periods of time with her child over the course of a

year). The Trial Judge was clear (referring to the Motion for Reconsideration) that it was not her intent to make a shared custodial relationship, and she had not.[6] However, since she wanted the Petitioner to pay the maximum amount of child support available, she failed to use the least restrictive means (or even a less restrictive means) to accomplish this; a simple deviation from the guideline. Rather than to take away approximately 4 overnights a year, the Trial Judge took away 26 evening visits, 26 overnights (which go from Tuesday to Wednesday), and 2 weekends (which go from Friday to Monday). In other words, the Trial Judge took away 86 days a year in which the Petitioner would have got to see his son just over money.[7] Again, the Trial Judge appeared to decide the financials first, and then catered the number of overnights and "best interests" standard to meet her financial end-state goals.

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[6] The Trial Judge had already awarded sold physical custody to the Respondent. Maryland statutes allow this even though the non-custodial parent may have their child over 128 overnights a year (which results in the shared guideline support worksheet / formulas to be used to determine child support).

[7] The intent of the Maryland legislature seems quite clear in the child custody statutes. The best interest of the child is supposed to be determined, and then the proper guidelines applied. These laws / guidelines were not meant to be "backwards engineered" so that a Trial Judge may determine first how much someone is suppose to pay, and define at a later point a "best interest of the child schedule" based on what the Trial Judge wants paid. The 128 overnights a year "shared guidelines" were intended to more evenly distribute financial support between two significant households that a child lives in. There was never any intent by the legislature for a Trial Judge to use these guidelines as an excuse to reduce visitation time, or to stay away from visitation schedule of 128 overnights a year. These guidelines were passed to promote uniformity for child support, and to comply with federal requirements that affect state funding.

Did the Petitioner receive a fair trial; and did the Trial Judge commit a harmful and prejudicial error by failing to automatically recuse herself and declare a mistrial; and did the Appellate Courts fail in recognizing that?

Petitioner alleges unequal treatment, lack of due process, and sexual discrimination throughout the Trial Court's hearings. The Trial Court took shortcuts that trampled on these due process requisites and made conclusions based on hunches rather than on evidence. This case represents the worst in disregard for proper mandated procedure. The Trial Court failed to comport with both procedural due process, and with the non-Constitutional procedures ordained by Maryland's Court of Appeals.

The Petitioner did not have a hearing before an impartial officer of the court. The Maryland Circuit Court Judge proceeding over the Petitioner's hearing was openly a member of two women's or women's rights organizations that exclude male membership; yet she made decisions concerning custody matters between a male parent and a female parent on a regular basis to include this trial decision currently being appealed. This is in violation of Maryland Rules: Title 16, Chapter 800, Rule 16-813; Canon 1, Canon 2 (A, B, and especially C), and Canon 3 (A (9) and C) and U.S. Constitutional due process requirements. The Trial Judge failed to disclose her membership in these biased, pro-woman, pro-mother organizations. Further, the Trial Judge failed to automatically recuse herself due to these previously undisclosed conflicts.

Additionally, the Trial Judge had a preconceived bias prior to and during the hearing. The Petitioner's hearing was three days. Near the end of the first day the Trial Judge spent 1 hour trying to mediate, arbitrate, and settle between both parties during the trial. Every settlement offered and suggested by the Trial Judge was already giving more custody to the mother than to the Petitioner. Furthermore the

Petitioner had yet to even present his side of the case. This same Trial Judge then spent approximately 1 hour on the second day of the hearing trying to mediate, arbitrate, and settle between both parties during the trial. Every settlement offered and suggested by the Trial Judge was already giving more custody to the mother-Respondent than to the father-Petitioner. Furthermore, the Petitioner had either yet to present his side of the case or had just started to present his side of the case. This is in violation of Maryland Rules: Title 16, Chapter 800, Rule 16-18; Canon 1, Canon 2 (A and B), Canon 3 (A (9) and C), and especially Canon 4 (H). The Trial Judge had even humorously made the comment along the lines of, "at least the parents agree on something," referring to the fact that neither the Petitioner, nor the Respondent, agreed to any of the Trial Judge's proposed settlements. Clearly, any Judge that takes part in mediating, arbitrating, and taking a direct part in proposed settlement agreements during the trial, should then automatically recuse herself from that trial.

The Petitioner did not have the opportunity to present, confront, and examine all witnesses and evidence. For example the Petitioner was prevented by the Trial Judge from putting 2 witnesses on the stand for fear that the Respondent would likely be prosecuted for criminal actions dealing with insurance fraud involving both state and federal funds. This same Trial Judge prevented the Petitioner from answering questions asked by opposing council. This same Judge prevented the Petitioner (and / or his council) from asking some questions to the opposing party that were relevant in these proceedings. However, the female parent of the Petitioner's son was never prevented from presenting, confronting, and examining all witnesses and evidence. This is in violation of Maryland Rules: Title 16, Chapter 800, Rule 16-18; Canon 1, Canon 2 (A and B), and Canon 3 (especially A (5), A(9), C).

The Trial Judge had made an erroneous and harmful decision in giving sole legal custody to the Respondent. Sole legal custody includes making all medical decisions and determining the medical insurance to be used. During the testimony, the Respondent stipulated that she had wrongly insured herself and her daughter on a medical insurance policy for a period of two years in which she was not eligible for. Additionally, the Petitioner showed evidence that the Respondent had enrolled both her daughter and her son (who is also the Petitioner's son) on a fraudulent medical insurance policy. Not only did the Trial Judge "gloss" over this, and protect the Respondent; but she ordered that the Respondent have sole legal custody ensuring that the child, James, is still enrolled on a fraudulent Medicaid policy at the expense of both federal and state taxpayers. Additionally, the Petitioner had always simultaneously insured his son, James, on a legitimate health insurance policy since his birth, while evidence shows that the Respondent provides a fraudulent health insurance policy for her children. In general, if a policy is fraudulent, it's the equivalent of no health insurance.

Throughout the three day hearing, the Trial Judge appeared to rush the trial. Additionally, the Trial Judge repeatedly made comments throughout the trial referring to how long this trial was, how many days the trial had gone on, and how much testimony she had heard. Additionally, the Trial Judge gave her ruling after a short recess at the end of the third day of the trial. The Trial Judge had given a similar order to the ones she had proposed when she was acting as a mediator the first day and second day of trial.

The Petitioner alleges sexual discrimination as a result of the Trial Courts' orders. After the trial's motion for reconsideration, the mother was given vacation time. Again, both father and mother are similarly situated (parents). The father must notify the mother by April 1st each year of the weeks that he wants to exercise his vacation. Additionally,

the father's vacation must be during the summer, and the mother may deny the father his requested dates for vacation. The mother must notify the father only 30 days prior to her vacation time. Additionally, the mother's vacation time may be anytime during the year. There is no legitimate state purpose in requiring the male parent to have more stringent vacation reporting requirements than the female parent to have. Additionally, there is no legitimate state purpose in requiring the male parent to take vacation time during the summer while the female parent may take vacation time anytime throughout the year.

At the contempt of court hearing on December 8, 2004, the Judge, the Honorable Vicki Ballou-Watts, gave legal advice to opposing counsel from the bench. The Judge told opposing counsel, Mr. Timothy Martin, that he should have asked for more money from the Petitioner because she (the Judge) would have given him more money. Again, the Judge was not acting as an impartial officer of the court. It is not the judge's role, nor does it promote fairness of a hearing, to give legal advice to one party and not the other. As soon as the Judge started to give legal advice to opposing counsel, she was briefly acting as opposing counsel and should have immediately recused herself.

The Trial Court failed to give Petitioner credit for all the child support paid to the Respondent from the effective date of her initial filing on December 3, 2002. Additionally, the Trial Court chose to utilize averages for its calculation of child support and accumulated child support arrearages from January 1, 2003, through June 7, 2004 instead of the more accurate month by month figures used by the Petitioner for payment of child support until the conclusion or trial. Using these averages for the "convenience of the Court," made roughly an $8,000 difference in the child support calculations. Had the Court used the more accurate expenses on a month by month basis instead of averages, the Petitioner

would have had a small child support credit instead of large arrears.

After the Motion to Alter and / or Amend the Order of the Court hearing, it was determined that the Petitioner did have his child at least 35% (128 days) of the overnights in 2004, and child support was to be recalculated using the shared guidelines. When child support was recalculated, the Trial Court did not allow the Petitioner to deduct his day care expenses. Again, both Petitioner and Respondent are similarly situated persons (parents), and the shared guidelines require taking into account both parents' work-related child care expenses (both parents are entitled to deduct their daycare expenses). The Trial Court did take into account the female parent's child care expenses (for a deduction), but would not allow a deduction for the male parent's child care expenses.

After the initial three day hearing, the Trial Court found it inappropriate to award counsel fees to either party. After the Motion to Alter and / or Amend the Order of the Court hearing, erroneous council fees were awarded to the Respondent. When child support was recalculated for 2004 using the shared guidelines, it was a reduced amount compared to the calculated arrears from the original three day hearing which used the sole guidelines. At that point, the Trial Judge awarded additional money to the Respondent called "counsel fees" which in value was approximately the difference between the Court's initial child support arrears for 2004 and the Court's newer child support arrears for 2004. In other words, the Court had a financial end state in what the Court wanted paid by the Petitioner to the Respondent, and used counsel fees to accomplish the Court's desired end state.

After the Motion to Alter and / or Amend the Order of the Court hearing, the Trial Judge appeared angered by the fact that the Petitioner had not yet paid the Respondent child support for July 2004 prior to the July 16, 2004 hearing. The

Trial Judge then took approximately 86 days (not overnights) of visitation from the Petitioner, imposed counsel fees on the Petitioner, gave the Respondent vacation time, and created a parenting plan that would always require use of the sole calculations child support guidelines. Some of the Trial Judge's reasons for doing this totally contradicted the reasons she gave after the initial three day hearing decisions that were in the "best interests" of the child.

Was Maryland's general statutory scheme, as applied by the Trial Court and the Appellate courts constitutionally compliant?

The term "statutory scheme" refers to Maryland's rules, codes, policies, and general practices whether written or not, and including, but not exclusive to, Maryland Code: Family Law (Titles 1-15), Maryland Rules: Title 9 (Family Law Actions), Maryland Rules: Title 10 (Guardians and Other Fiduciaries), Maryland Rules: Title 11 (Juvenile Causes).

Petitioner wishes to point out that Maryland Rule: Title 9. Family Law Actions: Chapter 100: Rule 9-108 simply states, "The court may make an award of temporary custody of a minor prior to a hearing." In this particular custody case, Maryland, during an emergency hearing, did make a temporary award of physical custody of James to the Respondent. This "temporary" custody order was in effect for approximately 1 ½ years prior to the Trial Court's hearing for custody. Precedent of the child's schedule is also set during this 1 ½ year period. Maryland's statutory scheme does not allow the Petitioner to appeal a temporary custody order. Also, Petitioner cannot try to remedy an unconstitutional temporary custody order through the Federal District Courts because it would simply be dismissed under the *Rooker-Feldman* doctrine. Under Maryland's statutory scheme, there is no possible remedy for petitioner, or any

other parent, under any set of circumstances to change, appeal, fix, or rectify any unconstitutional "temporary," precedent-setting custody order. In turn, this means there is no possible way to get this Court to ever review the constitutionality of a "temporary" custody order since it is not possible to be heard by Maryland's highest court. Maryland's statutory scheme allowing deprivation of a child prior to a hearing is without due process requirements, and any standards, policies, and practices used are vague, undefined, arbitrary, and thus unconstitutional.

The equal protection clause of the federal constitution requires that similarly situated persons be treated similarly.[8] The definition of unequal protection would be to grant favoritism or special rights to either of two similarly situated persons. There is no Supreme Court precedent saying these rights are lost or diminished by single parents who did not marry each other.

It is undisputed that every fit parent has fundamental, constitutional rights to direct the care, custody, education, and upbringing of their children. These rights spring from the 1st Amendment freedom of association, the rights to privacy and liberty, and the procedural and substantive due process rights outlined in the 5th and 14th Amendments. Given their fundamental nature, these rights can be infringed by state action only in the narrowest of circumstances and only upon passing strict scrutiny review.

In Troxel v. Granville,[9] this Court discussed and affirmed a dozen cases addressing the long history and foundational importance of these rights:

> The liberty interest at issue in this case—the interest of parents in the care, custody, and

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[8] San Antonio ISD v. Rodriquez, 411 U.S. 1, 89 (1973) (Marshall, J. dissenting) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

[9] Troxel v. Granville, 530 U.S. 57, 65 (2000).

> control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in Pierce that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Id., at 535, 45 S .Ct. 571. We returned to the subject in *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.*, at 166, 64 S. Ct. 438.[10]

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[10] This is only the plurality opinion. In an unprecedented manner, in every concurrence and dissent in Troxel, the Justices unanimously affirmed that the right to parent is a fundamental, inalienable Constitutional right.

The right of parents to direct their children's education has been repeatedly recognized as a distinct, fundamental, constitutional liberty interest worthy of protection by the courts and preserved by the 14th Amendment.[11] It can only be modified or infringed by the application of specific Fourteenth Amendment protocols, including notice, full evidentiary hearing, and the state must prove - by clear and convincing evidence - that a compelling state interest is being protected and that the infringement is the least-restrictive means of fulfilling that interest (i.e. strict scrutiny).[12]

In Pierce v. Society of the Sisters,[13] the Supreme Court held that a parent's right to direct their child's education is a fundamental liberty right that cannot be disparaged by government actions or rulings.

The Fifth Circuit has recently called the right of parents to put their children in a school of their choosing a "clearly established" right. This right is so well established that a school superintendent was stripped of his qualified immunity when he violated it.[14] Courts are just another state actor.[15] They are equally bound to abide by the Constitution as are school superintendents.

In this case, we have the same situation faced in Troxel: a disagreement between Petitioner and the trial court as to what is in the "best interests" of the Petitioner's child. See Troxel, 530 U.S. at 72-73. "As we have explained, the Due Process Clause does not permit a State to infringe on the

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[11] Troxel, 530 U.S. at 65-66; Thornbaugh v. American Coll. of Obst. & Gyn., 476 U.S. 747, 773 (1986) (Stevens, concurring); Weinberger v. Salfi, 442 U.S. 749, 771 (1975); Griswold v. Connecticut, 381 U.S. 479, 503 (1965).

[12] Saenz v. Roe, 526 U.S. 489 (1999); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732-33 (1982); San Antonio ISD v. Rodriquez, 411 U.S. 1, 16-17 (1973).

[13] Pierce v. Society of the Sisters, 268 U.S. 510, 534-535 (1925).

[14] Barrow v. Greenville ISD, 332 F.3d 844 (5th Cir. 2003).

[15] Lehr v. Robertson, 463 U.S. 248, 266 n.24 (1983).

fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."

The "best interests of a child", hereinafter "BIC," standard is hopelessly vague, and its application is always arbitrary. The BIC standard is not helpful because "it provides little real guidance to the judge, and his decision necessarily must reflect personal and societal values and mores."[16] By definition, this type of absolute power never passes Constitutional muster.

The BIC standard is also hopelessly overbroad because there are no objective, statutory criteria framing its definition. This Court must clearly recognize that the BIC standard is no standard at all because it is so vague, over-broad, and all-encompassing as to allow complete discretion to reside in the state judges charged with its use. As such, it is as unconstitutional as any other law struck down during the entire history of this Court's rulings.[17]

The BIC standard gives no guidance for future behavior. "A law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."[18] Inconsistency is guaranteed because BIC is so open to the whims, habits, and personal biases of the particular judge involved.

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[16] Bellotti v. Baird, 443 U.S. 622, 655-56 (1979) (Stevens, concurring).

[17] This case falls within the Santosky holding, that while domestic relations are typically the province of the state courts, this has never required this Court to "blink at clear Constitutional violations in state statutes." Santosky, 455 U.S. at 768, n. 18. As demonstrated by Maryland's Court of Appeal's refusal to hear this case, Maryland courts are apparently not overly concerned about people's federal constitutional rights, leaving the responsibility on this Court to correct these errors.

[18] Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966) (such standards are unconstitutional and void for vagueness).

Maryland's current statutory scheme has placed parental rights in an inferior standing vis-a-vis their children's rights, it again violates equal protection.

The BIC statutory scheme has no objective criteria or parameters that are binding on the state official charged with their enforcement. This statutory scheme lacks the constitutionally required certainty which all valid statutes possess. Since the trial court's judgment was based on application of such statutes, it must be reversed.

Additionally, the Trial Court failed to provide petitioner any pre-deprivation hearing.

Another reason for the requirement of objective, articulated standards is so that appellate courts may conduct enlightened reviews of the exercise of discretion vested in lower courts. It is tough for the petitioner to challenge the best interests finding in Maryland's appellate courts because it is by definition a purely "discretionary" call by the court and thus, there is no way to point to the court's failure to comply with objective criteria in making its decision. Meaningful appellate review of such decisions under an "abuse of discretion" review standard is close to impossible.

CONCLUSION AND PRAYER

Prior to depriving a fit father of legal custody and shared physical custody of his child, a trial court must first have jurisdiction. That trial court must then have a compelling state reason to interfere with the child-parent relationship while affording the parent due process and a fair trial. Also, the trial court is required to use the least restrictive means available by narrowly tailoring its interference to fulfill the compelling state reason. Lastly, Maryland's statutory scheme is unconstitutional because it wrongfully deprives fit and suitable, but unmarried, parents of their rights, denies them the equal protection of the laws, and makes it impossible for many of them to raise their

children without undue, arbitrary, and debilitating government interference. Maryland law and Maryland courts accomplish these deprivations by simply invoking the vague, overbroad, and capricious "best interests of the child" standard.

In this case at hand, the Petitioner asks this Court to issue a writ of certiorari, and upon full briefing and review, reverse the judgment of the Maryland state courts, declare that the State Courts are without jurisdiction, or remand for a new trial, to issue a temporary custody order giving the Petitioner immediate custody to "make up for lost time" until such new trial so that both Petitioner and Respondent have had equal length times of sole custody; and either strike the relevant Maryland law family statutes as unconstitutional, or, in the alternative, remand the case for proper, strict-scrutiny review.

Respectfully submitted,

William A. Weckel
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Abingdon, MD 21009
(410) 569-2484
(443) 421-1080

WLLIAM A. WECKEL	*	IN THE
	*	COURT OF APPEALS
	*	OF MARYLAND
v.		
	*	Petition Docket No. 406 September Term, 2005
DENISE R. DEMONTE	*	(No. 1117, Sept. Term, 2004 Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals filed in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

s/ Robert M. Bell

Chief Judge

DATE: December 21, 2005

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No 1117

September Term, 2004

WILLIAM ALAN WECKEL

V.

DENISE R. DEMONTE

Murphy, CJ.,
Krauser,
Bloom, Theodore C.
(Retired specially assigned)

JJ.

Opinion by Krauser, J.

Filed: September 30, 2005

Appellant, William A. Weckel, and appellee, Denise R. DeMonte, are the parents of three-year-old James DeMonte Weckel. Three months after James's birth, DeMonte filed a petition for custody and child support in the Circuit Court for Baltimore County. After a hearing, the circuit court awarded sole legal custody of James to DeMonte and ordered appellant to pay child support to her. Appealing from that order, appellant presents four issues for our review. Reordered they are:

I. Whether the Court abused its discretion in failing to enter an award of joint legal custody with the mother being the tie breaker in the event the parties were unable to reach a joint decision.

II. Whether the Court erred in using averages for its calculation of child support and accumulated child support arrearages from December 1, 2002, through June 7, 2004, instead of the month by month figures used by the Appellant for payment of child support until the conclusion of trial.

III. Whether the Court's Amended Order of July 22 2004, modifying and reducing the Appellant's overnight visitation was an abuse of discretion by the trial court motivated not by the best interests of the child, but rather by 1) the Court's anger at the Appellant for failing to pay any child support in the month of July, 2004, and 2) its efforts to work an ex post facto revision of the visitation schedule to require application of the sole instead of shared child support guidelines.

IV. Whether the Circuit Court erred in failing to base the child support calculation of the Appellant based on the time from the entry of the Pendente Lite Order of February 10, 2003, instead of the calendar year even though more than one year had passed from the time of the entry of the pendente lite order and conclusion of the trial on June 7, 2004.

For the reasons that follow, we shall affirm the judgment of the circuit court. (Page 1 of 23)

Background

The parties had been dating for three months when DeMonte became pregnant. On August 28 2002, James was born.

During her pregnancy, DeMonte lived in Maryland with her daughter from a previous relationship, Daisy. Appellant lived two hours away in Allentown, Pennsylvania. They initially agreed that their new son would live with DeMonte for three months while she breast-fed him. During that time, appellant would visit on weekends, staying in her basement.

After James was born, appellant was with him through the end of August, and at least half of the days in September, October, November and December 2002. He and James stayed either at DeMonte's residence, at his home in Pennsylvania, or at his parents' home in Bel Air, Maryland. When, on January 9, 2003, appellant was laid off from his employment at Agere Systems in Pennsylvania, he moved into his parents' house in Maryland.

Proceedings

During DeMonte's pregnancy and after James was born, disputes arose between the parties regarding day care, health insurance coverage, and issues of custody and visitation. On December 3, 2002, Demonte filed a petition for custody and child support in the Circuit Court for Baltimore County, alleging that appellant had threatened to keep James from her and to take him out of the country. DeMonte requested that the court grant her sole legal and

physical custody of James and order appellant to pay child support and maintain health insurance for James. In response, appellant filed an answer and counter-complaint, requesting sole legal custody of James.

Two months later, on February 5, 2003, when appellant failed to return James after a visit, DeMonte filed, in the Circuit Court for Baltimore County, a petition for emergency custody. Following a hearing, the Baltimore County circuit court entered a pendente lite order , granting the parties joint legal custody and DeMonte physical custody. The court established a visitation schedule under which appellant would have James every other weekend, every Tuesday night, and on Wednesdays during the week before those weekends on which he was not granted visitation.

In the spring of 2004, the circuit court held a three-day hearing on the parties' cross-petitions for custody. At that hearing, DeMonte testified that, after James was born, she and appellant discussed custody on several occasions and that, on those occasions, appellant "was very aggressive." She stated that he wanted to have joint custody, rotating on a weekly basis, but she did not think that that was "logistically" feasible. She recalled that, during one discussion, appellant "-jump[ed] in front of [her] and told her that "if [she] was to question him, that he would drive [her] [attorney's] bill up" so that she could not afford to pay for an attorney.

Describing the parties' dispute over health insurance coverage for James, she stated that, when James was born, she carried health insurance for him under Maryland Childrens' Health Program (MCPH). At the time she applied for the program, she and appellant had planned to insure James on appellant's Aetna policy through his employer, but they were not sure if appellant's insurance would provide coverage rn Maryland. Consequently, both appellant and DeMonte insured James although the MCPP insurance was secondary coverage. Shortly after appellant was laid-off from his employment at Agere Systems he informed DeMonte that he was paving approximately $65O a month to maintain the Aetna coverage, as permitted under COBRA, to provide James with medical insurance,[19] whereupon DeMonte suggested that she change James' MCHP insurance from secondary to primary coverage. She gave appellant documentation of that coverage, including a health care booklet which was used to determine James' pediatrician. DeMonte stated that, thereafter, she assumed appellant dropped the COBRA coverage She latsr discovered that he had not.

DeMonte also testified about the parties' dispute over day care for James. She stated that she had arranged for James to be cared for by Berna N. Taylor, a licensed day care provider, who also cared for her daughter, Daisy. Although appellant had initially

[19] Appellant paid $647.69 each month from February through May 2003 for the COBRA coverage for himself and James through Aetna. To cover one individual, the premium would be $323.85 for medical coverage and $42.84 for dental coverage.

agreed to this, beginning in February 2003, on the mornings after his overnight visits with James, appellant took James to his parents' house to be cared for by them, instead of sending James to day care with Taylor. Appellant did this without DeMonte's knowledge or consent. And, although appellant knew Demonte had already paid Taylor for the entire week of day care, appellant paid his parents $50.00 per week to care for James as well.

Appellant testified that he and DeMonte agreed that, for the first three months after James was born, he would pay child support based upon the Maryland Child Support Guidelines for sole custody. After that three-month period, he would pay child support based upon the Maryland Child Support Guidelines for joint custody. He stated that, in 2002, he earned $67,243.00, and paid DeMonte $1083.00 a month in child support in November and December 2002. However, in 2003, appellant earned $44,463.96, and only paid DeMonte a total of $2664.00 in child support payments. Appellant stated that, in January and February 2003, after he was laid-off, he paid DeMonte only $183.00 a month in child support, despite earning $14,111.00 during those two months. And, from March through June 2003, while appellant was receiving $410.00 a week in unemployment benefits, he paid DeMonte $150.00 a month in child support. He testified that, during the time he was unemployed; he was living at his parents' house and had no living expenses. In July 2003, appellant began working for the Ryland Group. His

salary for 2004 was $46,550.00 a year and he paid DeMonte $395.00 a month from January through April 2004.

As for health insurance coverage for James, appellant testified that he and DeMonte had agreed that he would provide the coverage through his employer, Agere. After he was laid-off by Agere, he elected to maintain that insurance under COBRA because he was unaware of DeMonte's MCHP insurance. Appellant stated that he did not find out about the MCHP insurance until the documents were produced during discovery and that he had concerns about the validity of that insurance.

At the conclusion of the hearing, after determining that both parties were "fit" parents, the court made the following findings:

> The desire of the natural parents and the agreements between them — and, of course, I'm through the factors outlined in *Montgomery County versus Sanders*. Both parents seek custody. They did reach an agreement of the holiday visitation schedule when they were ordered to participate in mediation, I believe, back in March.... But the holiday visitation schedule that they agreed to was never reduced to an order.
>
> The Court did pass an order in February of 2003 setting a schedule for visitation with James. And that has been the topic of much of the testimony because from Miss Demonte's [sic] perspective, it is not a good schedule. She feels that it is disruptive and it givens a child who is less than two years old four different rules to live by. On the other hand, [appellant] and his parents, in particular, feel that although, perhaps initially, it looked as though this was a schedule that would be impossible for a child that age, that it would - it has tuned out

to work. rather well. The consistency and stability of that visitation arrangement is in the eye of the beholder like so much else in this case.

The potential for maintaining natural family relations: A I mentioned earlier, James has bonded with his [half] sister Daisy. She's four years old. The live and play together. They have attended daycare ever since Miss Demonte [sic] went back to work. And the Court sees benefit in that. The Court also sees benefit in James interacting with other children. I also see benefit in being able to visit with his paternal grandparents. But I do think that the daycare arrangement through Mrs. Berna Taylor has been a good one for him.

The preference of the child is not really a factor for the Court to consider because James is approximately 21 months old.

Material opportunities affecting the future life of the child: Both parents are gainfully employed, [employed] by Rvland Homes and M:ss Demonte [sic] is employed as an audiologist. Both parents. as I indicated, have established good homes for James to reside in and there are opportunities there for him. There's been some discussion about private school versus public school but that's really not an issue at this point in time.
The age. health and sex of this child: James. again, is less than two years old. He's a male. He appears to be in good health. And both parents have gone to doctors' appointments. [Appellant] testified that sometimes he arranged the appointments; sometimes Miss Demonte [sic] arranged the appointments. But he has been kept up-to-date with respect to his health care.

I've talked about the residence -- residences of the parties. And the parents. [appellant] and Miss Demonte [sic], live

The length of separation of the parents: The parties were never married. Miss Demonte [sic] did accommodate [appellant] in terms of creating a bedroom down in the basement of her home so that he could spend time with James during the first few months of his life. The relationship did deteriorate. But, in any event, [appellant] has obviously had an opportunity to see James; although. it is obviously not as often as he would have liked.

There did come a point in the beginning where [appellant] testified that he was not getting the visitation he wanted, and so he did keep James. And that precipitated the emergency hearing in February of 2003.

There's been no prior voluntary abandonment or surrender of custody of the child in the Court's opinion.

The court - I'm going to get to the bottom line here. I find that it is appropriate to award Miss Demonte [sic] sole physical and legal custody. I have also taken into consideration under Taylor versus Taylor with respect to joint legal custody. I know that [appellant] feels very strongly that joint legal custody is something that should be awarded in this case. I believe the potential is there, but I don't think the parties are at a point in time where it's appropriate for the Court to order.

There have been e-mails back and forth between the parties. They can't agree on the health care coverage. They have had many disputes about that. I'm not so much concerned about the question of whether there's going to be private school or public school because, again, the child is less than two years old. But there have been disputes about other matters which impact upon the parties' ability to have good communication.

There was testimony that [appellant] would not be flexible regarding visitation and so Therefore. Miss Demonte [sic] wouldn't be flexible on visitation. There was one exception made, I believe, when [appellant's] brother came o town. But other than that, there was no flexibility between the parties.

The child care arrangements: The Court finds it important for the parties to communicate about that. Yet there seems to have been no communication about taking James out of his regular child care with Mrs. Taylor and having him spend time with the paternal grandparents. I am not suggesting that spending time with the paternal grandparents is a bad thing. I think spending time with them is good. But I don't know that the appropriate time to arrange that is in the middle of the week where he's pulled out of his regular schedule. The Court does find that disruptive.

There have been disputes between the parties over other issues, and the Court just finds that at this point in time the parties are not able to communicate at a level which joint legal custody appropriate.

Miss Demonte [sic] testified that [appellant] is controlling and they can't agree on minor issues. My observation is that the parties have some ways to go with respect to communicate in James' best interest. Again, I believe the potential is there in the future and, perhaps the Court's decision will create some stability and enable the parties to move forward.

Thereafter, on June 25, 2004, the court entered an order granting DeMonte "sole legal and physical custody" and awarding appellant visitation on alternating weekends, from Friday to Monday mornings, overnight on Tuesdays during weeks before non-visitation weekends, and Wednesday evenings during week before visitations.

(Page 9 of 23)

weekends[20]. In addition, it granted appellant two weeks of vacation with James in 2004, three weeks in 2005, and four weeks in 2006. It divided the holidays according to a prior agreement between the parties, which would supercede the regular visitation schedule.

The court also ordered appellant to pay $7238.00 in child support arrearages ($5516.00 for 2003 and $1722.00[21] for the first half of 2004, based on the Maryland Child Support Guidelines[22] for sole custody. $3510.00 of the $7238.00 was to be paid within 45 days of the order the balance was to be paid over 24 months and $138.00 on the 25th month. In addition to the arrearages, the court ordered appellant to pay $739.00 in monthly child support.

In determining the amount of support owed for 2003, the court determined that DeMonte' s actual monthly was $3510 .00. Because, in 2003, appellant received income from Agere, unemployment benefits, and the Ryland Group, the court combined those three sources of income and concluded that his monthly income was $3705.00. The court then deducted $168.00 from appellant's monthly income for health insurance premiums paid by him. As for

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[20] The order also instructed the parties not to make or permit derogatory remarks about the other parent in front of the child, instructed Demonte to keep appellant informed and arrange to have him informed by the appropriate authorities with respect to school, medical, sports, scouting, extra-curricular and religious activities.

[21] The determination of the amount of arrearages for 2004 assumed that appellant had paid $395.00 for child support for June 2004.

[22] See Md. Code (1999, 2004 Repl. Vol.) §12-204 (1) (1) of the Family Law Article.

that deduction, the circuit court stated that "there was a question about whether [appellant] knew whether there was other coverage in effect and why it was necessary to pay the COBRA when there was existing coverage." Consequently, the court found that it was "appropriate to give him the deduction of 168 per month for the health insurance."

The court denied DeMonte's request for attorney's fees, stating:

> With respect to the issue of attorney's fees and costs, [appellant] has greater resources, and I do find there's been a substantial justification for these proceedings. But in light of the fact that the Court has ordered retroactive child support, I'm not going to award attorney's fees in this case. I am not trying to create an extra burden. I do think [appellant] could have done a better job of providing more child support as the case went along. He didn't do that. . . . But because, again,. Of the Court's award of retroactive child support to January of 2003, I'm not going to award attorney's fees.

Both parties filed motions to modify the judgment. DeMonte sought clarification of the June 25, 2004 order because the circuit court "fashioned a schedule for visitation which results in [appellant] having James at least 131 overnights for 2004, i.e. shared physical custody" while ordering him to pay child support under the sole custody guidelines. In addition, DeMonte requested that if the court reduced any amount of the arrearages, that it "revisit (her] entitlement to counsel fees and revise the ruling

vis-a-vis [her] claim."

Also noting that the visitation schedule provided for more than 128 nights with James, appellant argued that the shared guidelines formula rather than the sole custody guidelines should have been used to calculate his child support obligation. He further requested that the court reconsider its exclusion of the day care payments he made to his parents, and, finally, that joint legal custody be granted with a provision that, in case of any disagreement, Demonte would be the "tie breaker."

On July 22, 2004, the circuit court amended its earlier order. The amended order stated that the child support arrearages for 2003 would be based on the shared custody guidelines. In doing so, it recalculated the amount of appellant's child support obligation for 2003 to be $443.67 per month, for a total of $5324.04. From that amount, it subtracted the $2664 00 that appellant had already paid, resulting in a 2003 arrearage of $2660.00. The court ordered appellant to pay that arrearage within 60 days.

The court did not alter appellant's monthly child support payment of $739.00 or the 2004 child support arrearages of $1722.00, except to order that the arrearages for 2004 were now to be paid in 24 installments of $71.75 together with the monthly support amount.

As for custody and visitation, the court stated that its earlier order had "granted a visitation schedule which

unintentionally and inadvertently created a shared custody schedule." Accordingly, it would be "in the minor child's best interest" to reduce that schedule to create a sole custody schedule with visitation. The court did so by providing chat appellant would have the child on alternating weekends, from Friday to Monday mornings, and one Thursday evening per month from 3:00 p.m. to 7:00 p.m. Beginning in 2005, the one Thursday evening per month continued overnight until the following Friday morning. The court further provided that, for summer vacation in 2004, appellant would have James for two weeks, and DeMonte for one week of uninterrupted vacation time. In 2005, appellant would have him for three weeks of summer vacation, and DeMonte for one week of uninterrupted vacation time. And, in 2006, appellant would have James for four weeks of summer vacation, and DeMonte would have two weeks of uninterrupted vacation time.

Furthermore, the court granted DeMonte's request for attorney fees, stating:

> In light of this Court's finding of substantial justification in [DeMonte] in filing and defending these proceedings and in consideration of [DeMonte's] needs, financial resources of each, [DeMonte's] ability to pay and this Courts reduction in child support arrearages in 2003, [appellant] shall pay reasonable attorney's fees to [DeMonte's] counsel in the amount of $2800 within thirty (30) days of this Order.

Thereafter, appellant noted this appeal.

Standard of Review

Our standard of review of a circuit court's custody determination is limited. *Barton v. Hirshberg*, 137 Md. App. 1, 24 (2001). The court's findings of fact will not be disturbed unless they are clearly erroneous. *Davis v. Davis*, 280 Md. 119, 124 (1977). "A finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Lemley v. Lexciey*, 109 Md. App. 620. 628 (1996). "Under the clearly erroneous standard, this Court does not sit as a second trial court, reviewing all the facts to determine whether an appellant has proven his case. Instead, our task is to search the record for the presence of sufficient material evidence to support the chancellor's findings." Id. In doing so, "all evidence contained in an appellate record must be viewed in the light most favorable to the prevailing party below." Id. (citing *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 41 (1978).

The rationale for such deference is that the circuit court, unlike an appellate court, has the "opportunity to observe the demeaner and the credibility of the parties and witnesses." Petrini v. Petrini, 336 Md. 453, 470 (1994). With respect to legal conclusions, "[if] it appears that the chancellor erred - further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless." *Davis*, 280 Md. at 126; *Viamonte v. Viamonte*, 131 Md. App. 151, 157 (2000) (stating that, with respect to matter of law, "we apply the harmless error

standard").

"Finally, when the appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion." Davis, 28C Md. at 126. A clear abuse of discretion occurs when "'no reasonable person would take the view adopted by the [trial] court . . . .'" *Metheny v. State*, 359 Md. 576, 604 (2000) (quoting In Re Adoption/Guardianship No. 3598, 347 Md. 295, 312 (1997) (emphasis omitted)). See also *Boswell v. Boswell*, 118 Nd. App. 1, 27 (1997) (stating that an abuse of discretion occurs when a court acts "'without reference to any guiding rules or principles,'" when a ruling "'appears to have been made on untenable grounds,' is "'clearly against the logic and effect of facts and inferences before the court,'" and is "violative of fact and logic'") (quoting North v. North, 102 M App. 1., 13-14 (1979) (citations omitted).

Discussion

Appellant contends that the circuit court abused its discretion in failing to grant joint legal custody. We disagree.

In exercising its discretion in a child custody case, the circuit court's "paramount concern is the best interest of the child." McDennott v. Dougherty, 385 Md. 320, 438 (2005) (quoting

Taylor v. Taylor 306 Md. 290, 303 (1986)). It is "'of transcendent importance' and the 'sole question.'" Id. Therefore, "[t]he best interest of the child is ... not considered as one of many factors, but as the objective to which virtually all other factors speak." Id.

Indeed, in a custody dispute, numerous factors determine what is in the "the best interests of the child, although no single list of criteria will satisfy the demands of every case." Id. In *Montgomery County Dept. of Social Services v. Sanders*, a case involving an award of sole custody, we considered the following factors:

> 1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) potentiality of maintaining natural family relations; 5) preference of the child; 6) material opportunities affecting the future life of the child; 7) age, health and sex of the child; 8) residences of parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender.

38 Md. App. 406, 420 (1977) (internal citations omitted). And in Taylor, a case involving an award of joint custody, the Court of Appeals considered several additional factors: 1) capacity of the parents to communicate and to reach shared decisions affecting the child's welfare; 2) willingness of parents to share custody; 3)relationship established between the child and each parent; 4)

potential disruption of child's social and school life; 5) demands of parental employment; 6) sincerity of parents request; 7) financial status of the parents; 8) impact on state or federal assistance; and 9) benefit to parents. Taylor. 306 Md. at 303-311.

In determining whether joint custody is appropriate, the *Taylor* Court observed that the capacity of the parents to communicate and to reach shared decisions affecting the child's welfare "is clearly the most important factor ... and is relevant as well to a consideration of shared physical custody." *Id.* at 304. The Court cautioned:

> Rarely, if ever, should joint legal custody be awarded in the absence of a record of mature contact on the part of two parents evidencing an ability to effectively communicate with each other concerning the best interest of the child, and then only when it is possible to make a finding of a strong potential for such conduct in the future.

Id.

In awarding DeMonte sole legal custody, and thereby declining to grant the parties joint custody, the circuit court stated:

> There have been disputes between the parties over other issues and the Court just finds that an this point in time the parties are not able to communicate at a level which joint legal custody appropriate.

In reaching that conclusion, the circuit court specifically considered the relevant factors outlined *Sanders* and *Taylor*. The court expressed its concern about the parties' ability to communicate and reach shared decisions affecting James, welfare and

cited several examples of their failure to communicate in the past. The court stated that the parties could "not agree on the health care coverage" and that they "have had many disputes about that." They had also failed to communicate with each other about James' day care. The court noted that appellant did not talk to DeMonte before he took James out of his regular day care arrangement with Taylor and that "pull[ing] [James] out of his regular schedule" was "disruptive." The court also pointed out that there had been "no flexibility between the parties" regarding visitation.

The circuit court therefore concluded that it was in the child's best interest for DeMonte have physical and sole legal custody. This decision was reasonable, given the parties' past conduct, and certainly did not constitute an abuse of discretion.

II.

Appellant contends that the circuit erred "in using averages for its calculation of child support and accumulation of child support arrearages from December 1, 2002, through June 7, 2004 instead of the month by month figures" that he had previously used to calculate his child support payments. Specifically, appellant argues that the court erred in determinating the amount of health insurance premiums to deduct from his monthly income and in failing to give him credit for child support payments he made in 2002.

a.

As for the health insurance premiums, appellant claims that the

circuit court should have deducted the actual amount of health insurance premiums that he paid to maintain Aetna insurance under COBRA after he was laid off from Agere, which was $647.69 a month from February through May 2003. Instead, the circuit court credited appellant with only $168.00 per month for health insurance.

DeMonte testified, however, that when James was born, he was insured by both MCHP and by Aetna through his father's employer and that they had agreed that the MCHP coverage would be secondary coverage, while the Aetna coverage would be primary. When she learned that appellant had been paying $647.69 to maintain the Aetna coverage under COBRA, she advised him that she would convert the MCHP insurance from secondary to primary coverage. Appellant, however, did not cancel the Aetna policy and continued to pay the premiums unnecessarily.

Appellant, however, testified that he and DeMonte agreed that he would provide health insurance for James through his employer. When he was laid off by Agere, he elected to maintain that insurance under COBRA by paying $647.69 per month. He stated that he was unaware of the MCHP insurance until documents were produced during discovery. He further expressed concerns regarding the validity of the insurance provided by MCHP.

The circuit court "'is not only the judge of a witness' credibility, but is also the judge of the weight to be attached to

the evidence.'" *Kowell Ford, Inc. v. Doolan*, 283 Md. 579, 581 (1978) (quoting *Ryan v. Thurston*, 276 Md. 390, 392 (1975)). The court apparently did not believe appellant's testimony that he did not know DeMonte had provided insurance for James through MCHP, and therefore chose, for that and other reasons, not to credit him with the full $647.69 a month he paid to continue the Aetna coverage through COBRA. We have no reason to disturb that decision.

Appellant also claims that he should have been given credit for child support payments that he made in December 2002. At trial, the circuit court asked DeMonte's counsel whether his client requested child support dating back to December 2002 when she filed her petition for custody and child support. He explained to the court that she only requesting child support from January 1, 2003 to the present because appellant had paid $1083 .00 in child support in December 2002.

Obviously DeMonte could have requested support for 2002, but chose not to do so because of 2002 payments made by appellant and the court, in honoring that request, was crediting appellant for the 2002 payments. Appellant did not object to this trade-off. Rather, he encouraged the court to award child support starting from February 2003 in support of this arrangement. The end result was that, although the court did not credit appellant for the $1083.00 he paid in December, neither did it impose upon appellant

any support obligation for that month or any other in 2002. That hardly constituted error.

III.

Appellant contends that the circuit court abused its discretion when it amended its June 25, 2004 order, reducing appellant's overnight visitation so that the sole custody child support guidelines would apply. The circuit court's decision, appellant claims, was motivated by anger at appellant for his failure to pay child support for July, 2004. There is simply no evidence that the court acted out of pique, as appellant claims.

Moreover, Md. Rule 2-534 permits the court to amend its judgment. That rule provides:

> In an action decided by the court, on motion of any party filed within ten days after entry of judgment, the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment. A motion to alter or amend a judgment may be joined with a motion for new trial.

Although no new testimony was taken, appellant conceded that he had not paid the installment of child support that was due July 1, 2004. That prompted the circuit court to ask:

> Well, Why shouldn't I accept the argument of [DeMonte's] Counsel that this really-- the motivation for these additional nights is monetary?

* * * *

He makes a good income. Any, you know, he's nickel and diming mom, to the child's detriment.

I don't have a problem with applying the law. And if he's entitled to a shared custody guideline support obligation, then that's what's going to be included in the order. I don't have a problem with that. But I do have a problem with some of the things that have come out in the trial and the fact that he hasn't stepped up to the plate. And that concerns me.

Does he really want to spend the additional time with the child because he wants to spend time with his son or is this about trying to reduce his bottom line?

And in denying appellant's request for joint custody, the court stated that it "granted a visitation schedule which unintentionally and inadvertently created a shared custody schedule." Concluding that it was "the minor child's best interest" to do so, it modified visitation to reflect a sole custody schedule. That did not constitute an abuse of discretion.

IV.

Appellant contends that circuit court erred in failing to calculate child support starting from the entry of the February 10, 2003 *pendente lite* order rather than from the beginning of the calendar year.

Family Law § 12-101 (a) (3) provides "the court may award child support for a period from the filing of the pleading that requests child support." DeMonte initially requested child support in her

December 3, 2002 petition. Therefore, the court was within its discretion, and, did nor err in awarding child support as of January 2003.

JUDGMENT AFFIRMED

COSTS TO BE PAID BY APPELLANT

DENISE R. DEMONTE	*	IN THE
Plaintiff/Counter-Defendant		CIRCUIT COURT
vs.	*	FOR
WILLIAM ALAN WECKEL	*	BALTIMORE COUNTY
Defendant/Counter-Plaintiff	*	Case No. 03-C-02-013320

* *

AMENDED ORDER

Upon the Plaintiff's Motion for Clarification, Amendment and/or Modification and Defendant's Motion for Reconsideration and/or to Alter, Amend or Revise this Court's Order of June 23, 2004; a hearing having ensued on July 16, 2004 regarding these Motions; both parties having appeared with counsel; exhibits and arguments of counsel having been considered; this Court having made oral rulings regarding these Motions; this Court having further considered the merits of both parties' Motions it is this 22nd day of July, 2004, ORDERED as follows:

1. Defendant's Motion with respect to health insurance expenditures, daycare expenses paid to the paternal grandparents and joint legal custody are denied, in toto, for the reasons stated on the record by this Court; and it is further, ORDERED:

2. The Defendant's Motion with respect to a recalculation of child support based upon shared custody guidelines is granted in part and denied in part as follows:

A. Child support for 2003 shall be based upon shared custody guidelines and this Court adopts Plaintiff's July 16, 2004 Exhibit 1 As a result, the

child support for 2003 is recalculated at $443.67 per month for a total of $5,324.04 — less the sum of $2,664.00 paid by Defendant. The arrearage for 2003 is set at $2,660.00 and the Defendant is ordered to pay that sum to Plaintiff within sixty (60) days of the date of this Order.

B. The Court determines that the arrearages owed by the Defendant for January through June 2004 are $1,722.

C. Accounting from August 1' and payable on the V' day of each month thereafter, Defendant shall pay to the Plaintiff the sum of $739.00 as child support plus $71.75 representing 1/24th of the $1,722.00 arrearage described above. This payment of arrearage shall be made each month until the arrearages are satisfied. Plaintiff's counsel shall prepare an Earnings Withholding Order reflecting the payment of current child support ($739.00/mo.) plus arrearage ($71.75) and submit this Order to this Court as soon as possible.

3. The Court ordered sole physical and legal custody to Plaintiff and stated its reasons on the record on June 7, 2004. However, the Court granted a visitation schedule which unintentionally and inadvertently created a shared custody schedule. This Court finds that it is in the minor child's best interests to grant Plaintiff's Motion and modify this Court's Order of June 23, 2004 as follows:

a. Commencing as of the date of execution of this Amended Order and for the balance of this year, Defendant shall have the child every other weekend from Friday at 3:00 p.m. until Monday a.m. when he shall return the child to daycare or to Plaintiff's residence as appropriate.

b. In addition to weekend visitation, Defendant shall have the child one (1) Thursday evening per month from 3:00 p.m. to 7:00 p.m. — with Defendant picking the child up at 3:00 p.m. and Plaintiff picking the child up at 7:00 p.m. Plaintiff shall designate the specified Thursday for said visitation and shall notify the Defendant at the beginning of each month.

c. For calendar years 2005-06 and thereafter, Defendant shall have visitation with the minor child on the weekend as described above. Additionally, beginning January 2005, instead of visitation on Thursday 3:00 p.m. - 7:00 p.m. once per month, Defendant shall have Thursday overnight visitation once per month from 3:00 p.m. Thursday until Friday a.m. when Defendant shall return the child to daycare/school or Plaintiff's residence as appropriate. Plaintiff shall designate the specified Thursday for said overnight visitation and shall notify Defendant of said overnight by the 1st of each month.

d. In 2004, the Defendant shall have two (2) weeks of summer vacation with the minor child. Plaintiff shall have one (1) week (7 days) of uninterrupted vacation time with the minor child in 2004. She shall give Defendant at least ten (10) days notice of the week she has selected for vacation in 2004.

For 2005 Defendant shall have three (3) weeks of summer vacation and Plaintiff shall have one (1) week (7 days) of uninterrupted vacation time with the minor child.

For 2006 and each summer thereafter, Defendant shall have four (4) weeks of summer vacation and Plaintiff shall have two (2) weeks of vacation

time with the minor child. The parties' vacation in 2005 and thereafter may be consecutive or nonconsecutive. In 2005 and thereafter, Defendant shall provide notice to Plaintiff of each intended vacation no later than April 1 of each year and Plaintiff shall give Defendant at least thirty (30) days prior notice of her intended weeks for vacation.

4. In light of this Court's finding of substantial justification in Plaintiff in fihna and defending these proceedings and in consideration of the Plaintiff's needs, financial resources of each, the Defendant's ability to pay and this Court's reduction in child support arrearages in 2003. Defendant shall pay reasonable attorney's fees to Plaintiff's counsel in the amount of 2,300.00 within thirty (30) days of the date of this Order.

5. This Amended Order is executed by this Court in accordance with the Court's rulings on the Motions described above. All terms of this Court's June 23, 2004 Order which are not inconsistent or in conflict with this Amended Order shall he incorporated herein. Until such time as the Earnings Withholding Order implementing child support goes into effect, Defendant shall make child support payments including arrearages as indicated directly to Plaintiff.

s/ Vicki Ballou-Watts, Judge
Vicki Ballou-Watts, Judge

DENISE R. DEMONTE	*	IN THE
Plaintiff/Counter-Defendant	*	CIRCUIT COURT
vs.	*	FOR
WILLIAM ALAN WECKEL	*	BALTIMORE COUNTY
Defendant/Counter-Plaintiff	*	Case No. 03-C-02-013320

****

ORDER

THE ABOVE MATTER having come before this Court upon Plaintiff/Counter Defendant's (hereinafter "Mother") Petition for Custody of a Minor Child and Defendant/Counter-Plaintiff's (hereinafter "Father") Counter Complaint for Custody of Minor Child; the hearing having taken place on May 17th, 18th and June 7th of 2004; both parties having been represented by counsel; the testimony of the parties and several witnesses having been heard and considered; numerous documents from both parties having been admitted and considered; the Court having heard and considered arguments of counsel and the Court having orally rendered its rulings and opinion on the record in open court, it is, by the Circuit Court for Baltimore County this _____ day of 2004 ORDERED: as follows:

1. Mother is granted sole legal and physical custody of James Edward DeMonte-Weckel, DOB 8/28/02.

2. Neither party shall make any derogatory remarks in front of the child regarding the other party; neither party shall allow anyone else to make any derogatory remarks in front of the child regarding the other party; both parties shall keep each

keep each other informed as to their current work, home addresses and telephone numbers: neither parties shall use the phone or e-mail to harass the other but only to convey information: Mother is to notify authorities with respect to school, medical, sports. scouting, extra curricular or religious activities that Father may be contacting then] from time to time and that all information is to be provided to Father upon his request; Mother shall also provide this information so that Father is fully conversant with all child's activities; Father shall be advised of all doctor's appointments and, to the extent possible, any emergency situations regarding the child: Mother shall not schedule activities intending that these conflict with Father's scheduled visitation; Mother shall provide Father with all school report cards and give him notice of any teacher meetings or other school related activities.

3. The Father shall enjoy visitation with the minor child as follows:

A. Every other weekend beginning Friday at 3:00 p.m. through Monday morning at which time the Father shall return the child to his daycare at the home of Ms. Berna Taylor.

B. During the week immediately preceding a non-visitation weekend, Father shall have the child from Tuesday at 3:00 p.m. to Wednesday in the morning returning the child to daycare.

C. During the week immediately preceding a visitation weekend, Father shall have the child on Wednesday at 3:00 p.m. and Mother shall pick the child up from Father's residence at 7:00 p.m. on Wednesday evening.

D. With respect to holiday visitation, the court incorporates the Parenting Agreement which was reached by the parties in mediation and is attached hereto and made a part of this Order. Furthermore, Mother's Day will be spent with Mother and Father's Day will be spent with Father. The holiday schedule will supercede the regular visitation schedule.

E. Summer vacation — In 2004, the Father shall enjoy two (2) weeks of vacation with the minor child either consecutive or non-consecutive. He shall notify the Mother of his intended vacation no less than ten (10) days prior to the intended vacation periods. In 2005, Father shall enjoy three (3) weeks of vacation and in 2006, the Father shall enjoy four (4) weeks of vacation with the child. In years 2005 and 2006, Father shall provide notice to Mother of his intended vacation no later than April 1". Mother shall be flexible in accommodating Father's intended vacation periods and will in good faith defer to Father's requests for vacation. If there is a true, legitimate conflict in scheduling these vacations, then Mother, having sole physical and legal custody, shall make the ultimate decision but shall in no way manipulate the circumstances to deny Father his vacation periods.

4. Child Support 2003 - The Court, having carefully considered the testimony and exhibits of the parties has found that Mother was the primary physical custodian of James in calendar year 2003. As such, the sole custody child support guidelines applied to that calendar year. The Court adopts Mother's guideline sheet appended hereto and which is made a part hereof. Applying the guidelines to the circumstances of 2003, the Court finds that Father owes child support to the Mother in the amount of $5,516.00 for 2003. The method of payment to the Mother of this child support arrearage is addressed in the paragraphs below.

5. Child Support — Jan. - June 2004 - The sole custody guidelines apply and this Court, assuming Father pays $395.00 towards child support in June 2004, finds that Father owes $1,722.00 in child support for the first six (6) months of 2004. The guideline sheet reflects these amounts and is attached hereto and made a part hereof. The total child support arrearages for all of 2003 and half of 2004 and the method of Father's payment is addressed in paragraph #6.

6. As of July 1, 2004, the sole custody guidelines apply and accounting from July 1" and payable each month, Father shall pay to Mother the sum of $739.00 for child support by wage attachment order to be prepared by counsel for the Mother. The guideline sheet reflecting this amount and all the other information required therein is attached hereto and prayed to be made a part hereof.

The total unpaid child support arrearages for all of 2003 and half of 2004 is $7,238. Father shall pay to Mother the sum of $3,500.00 within 45 days of the date of this Order. Additionally, Father shall pay $150.00 a month on the arrearages

calculated to be $3,738.00 after Father's payment of the lump sum described above. This arrearage shall be paid in the amount of 8 150.00 a month to be added to the child support indicated above for a total per month of $889. The monthly $150.00 arrearage amount shall he paid for 24 consecutive months with a last payment of 8138.00 to be made on the 25 month. Counsel for the Mother shall prepare a wage attachment Order which shall reflect the child support obligations and the arrearages as ordered by this Court.

7. For the reasons as stated by this Court on the record, the request for counsel fees by each party is denied and each party shall pay their respective counsel for all fees incurred in this matter.

8. All matters concerning the care, custody, guardianship and support of James Edward DeMonte-Weckel is subject to the further order and jurisdiction of this Court.

Approved as to Form:

s/ Timothy Martin
Timothy J. Martin
Counsel for Plaintiff/Counter-Defendant

s/ Thomas Harrison
Thomas G. Harrison.
Counsel for Defendant/Counter-Plaintiff

s/ Vicki Ballou-Watts
Vicki Ballou-Watts